

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs May 11, 2005

STATE OF TENNESSEE v. DAVID LEE WAKEFIELD

**Direct Appeal from the Circuit Court for Maury County
No. 13794 Jim T. Hamilton, Judge**

No. M2004-02290-CCA-R3-CD - Filed June 22, 2005

A Maury County Jury convicted the Defendant, David Lee Wakefield, of driving under the influence (“DUI”). The trial court granted the Defendant’s motion for a judgment of acquittal, and the State now appeals. Finding that there exists reversible error, we reverse the judgment of the trial court and remand the case for a new trial.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Reversed and Remanded

ROBERT W. WEDEMEYER, J., delivered the opinion of the court, in which NORMA MCGEE OGLE and ALAN E. GLENN, JJ., joined.

Paul G. Summers, Attorney General and Reporter; Michael Markham, Assistant Attorney General; Mike Bottoms, District Attorney General; and William Doak Patton, Assistant District Attorney General, for the appellant, State of Tennessee.

Gary Howell, Mt. Pleasant, Tennessee, for the appellee, David Lee Wakefield.

**OPINION
I. Facts**

On April 8, 2003, the Maury County Grand Jury indicted the Defendant for DUI and violation of the implied consent law. On December 29, 2003, at the Defendant’s jury trial, the following evidence was presented: Officer Cory England testified that, on January 19, 2002, he was a reserve officer with the Columbia Police Department. He recalled that, on that night, he was on patrol with Officer Jeremy Haywood, and he and Officer Haywood observed the Defendant “driving somewhat irrational[ly].” Officer England testified that the police patrol car, in which he and Officer Haywood were on patrol that evening, was equipped with a videotape recorder, and he produced the videotape of the Defendant’s traffic stop and subsequent field sobriety tests.

Officer Haywood testified that, on January 19, 2002, he was an officer with the Columbia Police Department, and he was, at the time of trial, an instructor of DWI detection and the in-car video surveillance systems in police cars. The officer said that he had taken a thirty-two hour course in DWI detection and field sobriety testing, and a forty hour course in instruction on DWI detection and field sobriety testing. Officer Haywood said that, on January 19, it was raining, and he was able to see the tracks of other vehicles on the wet pavement. He said that he noticed tracks that swerved through, and across, lanes and even swerved across the center line at one point. The officer recounted that he noticed there was only one car ahead of him on the road, and he caught up to that car to observe and to videotape the driver's driving. As the officer continued his testimony, the videotape of the traffic stop, and subsequent field sobriety tests, was played for the jury. The officer explained that the Defendant was driving at approximately fifty miles per hour, in a forty miles per hour zone. The officer noted that the Defendant changed lanes without a signal and went "all the way across" into the center of the road. He testified that he had activated his lights at that point and was attempting to pull over the Defendant's car. He said that the Defendant slowed and stopped at a green light, waited through the yellow and red light, and then turned and drove away when the light turned green again. After Officer Haywood pulled the Defendant over, the Defendant had trouble getting his license out of his wallet. The officer said that he detected a strong odor of alcohol on the Defendant, and the Defendant had slurred speech and bloodshot eyes.

Officer Haywood explained that he first conducted the horizontal gaze nystagmus test, and then he conducted the nine step walk and turn test. He said that, during the walk and turn test, he was watching to see if the Defendant could maintain balance, walk heel to toe, stay on the line, and keep his arms within six inches of his body. He explained that the Defendant did not touch heel to toe, he stepped off the line during the third and fourth steps, and he lost his balance on the pivot turn. Next, the officer said, he performed the one leg stand test. Officer Haywood explained that the Defendant said he had ankle problems and could not stand on one leg. Further, the Defendant did not follow the officer's directions correctly, by failing to keep his arms by his side and by failing to count off the seconds correctly. The officer testified that, during another test, when he asked the Defendant to touch the tip of his nose with his fingertips, the Defendant touched the "high-bridge up close to his [face] way away from the tip of his nose." The officer explained that the Defendant said that he had a college education, and the officer requested that he recite the alphabet from "A" to "L" and then from "N" to "Z." Officer Haywood explained that the Defendant failed the "ABC" test. The Defendant began with "C," then recited "A," "B," "C," "D," "L," and then the Defendant mumbled some letters in random order. On the second set of letters, the Defendant recited "N," "A," "L," "B." The officer said that the Defendant stated that he could not "do [the ABC test] if he was sober."

The officer testified that he then placed the Defendant under arrest and read him the implied consent law. Officer Haywood testified that he gave the Defendant the implied consent form to read and sign, and the Defendant signed the form acknowledging that he understood the law. He said that the Defendant refused to take a breathalyzer test. Officer Haywood testified that, in his opinion, based on his observations of the Defendant and the sobriety tests, the Defendant was too intoxicated to drive.

On cross-examination, Officer Haywood explained that the DWI detection instruction teaches officers not to inquire about physical infirmities, such as the Defendant's prior ankle problems, before conducting the field sobriety tests. He explained that if someone is able to walk and function normally, but with a mobility problem, that problem would probably manifest itself in a limp, for example, and the officer would then ask about the limp. He said that the Defendant did not have an obvious physical problem, but the Defendant volunteered information that he had previously broken both ankles. The officer admitted that changing lanes without a signal is not a traffic violation. He explained, however, that the Defendant drove between the right and left lanes for a distance, returned to the right lane, and then crossed fully into the left lane. The officer said that the temperature was about forty degrees that evening. He said that the Defendant admitted to consuming "a few drinks," and the Defendant clarified that he had "a couple of beers." The officer testified that the odor he detected from the Defendant was "not the stale smell of like beer. It was more of a sweet, liquor-type smell" The officer explained that, during the field sobriety tests, the officer was watching to see, not only if the Defendant could complete the specific tasks, such as touching the tip of his nose, but also whether the Defendant swayed, followed directions, and moved smoothly or "jerkily." Also, the officer was watching to see if the Defendant began the tests before he was instructed to do so.

On redirect examination, Officer Haywood testified that the Defendant had no excuse for failing the "ABC" test. Further, he said that the Defendant failed to follow instructions during the tests, repeatedly placing his hands behind his back and in his pockets, despite the officer's instructions to the contrary. He said that the Defendant's trouble retrieving his license also indicated that the Defendant was intoxicated because intoxication lessens finger dexterity.

The Defendant testified that, on January 18, before the traffic stop at around 1:20 a.m. January 19, he had driven back from Atlanta, where he and his ex-wife had gone to visit their daughter the day before. He said that he woke up at 6:30 a.m. on January 18, left Atlanta at about 9:00 a.m. that morning, and arrived back in Maury County at around 3:00 p.m. He recalled that he stopped at his mother's house in Culloeka, where he stayed for approximately one hour before driving home to Columbia. Upon his return to Columbia, the Defendant stopped at a bar to visit a friend. He said that he rode with his friend, in his friend's car, to another bar and restaurant, at about 5:30 p.m. The Defendant said that he ate a cheeseburger and drank a beer, and he stayed there "most of the evening shooting pool." He explained that his friend drove him back to his car, and, when the videotape first shows his car, he had just pulled out across the road and begun to drive home. He said that he did not have anything to drink before he arrived at the first bar, where he stopped to visit his friend. He thought he had one beer at the first bar, and about two more beers at the second bar. The Defendant said that, when his friend dropped him at his car, he did not feel any effects of the alcohol.

The Defendant said that he had been tired from a long day. He could not recall why he drove between lanes, but he explained that he was probably reaching down for something in the car or adjusting the windshield wipers. The Defendant recalled that he considered stopping for gas at a market, but he decided that he had enough fuel to make it home. He said that he then pulled into the

turn lane and stopped. The Defendant testified that he first noticed the police car when he was stopped at that intersection, and he said that the patrol car lights were on at that point. The Defendant explained that he waited until the light became green, turned left, and pulled off the road at a safe place. He said that he did not pull over immediately after the turn because there is an oncoming ramp for the highway at that location. He said that he had trouble locating his license in his tri-fold wallet, and he denied that he had trouble extracting the license from the wallet. The Defendant testified that he has broken both of his ankles previously, one of them twice, and his ankles swell when he stands for a long time, as he did earlier that evening. He said that, even if his ankles had not been not swollen, he would have had trouble standing on one leg due to his ankles and also a prior knee injury. He said that he is not used to saying his alphabet, and the officer's request regarding the "ABC" test "caught [him] off guard." The Defendant explained that he was attempting to keep himself awake and alert by playing loud music in his car, as the video tape revealed, because he was tired from the day of driving, not from the effects of any alcohol.

On cross-examination, the Defendant said that he graduated from high school and attended college for a few weeks, but he did not finish the first quarter. He said that the "hopping" he did on the tape was an attempt to stretch his knee because it was hurting him, and he did this despite his ankle problems. The Defendant stated that he could not do the one leg stand if he were sober. He said that he did not take the breathalyzer test because he was going to jail whether he took the test or not, and he felt that he had already done well on the field sobriety tests. He said that he had problems with the "ABC" test because the officer's instructions were confusing and because he is not very educated and does not recite the alphabet daily to stay familiar with it.

Following this evidence, the jury found the Defendant guilty of DUI and violating the implied consent law. The Defendant filed a motion for judgment of acquittal notwithstanding the verdict, in accordance with Rule 29 of the Tennessee Rules of Criminal Procedure. On August 25, 2004, the trial court entered an order granting the Defendant's motion, stating:

This was heard on the 29th day of December, 2003.

The Court has given this case serious consideration watching the video tape probably six time[s] to be certain as to what the Court's decision should be since this charge, DUI 4th offense is so serious.

First of all, this Court does not think that the officer had probable cause to stop the Defendant's vehicle. However, this was not raised by the defense.

Secondly, the Court finds that with the exception of the "leg raise" and the "ABC" task, the Defendant was successful in performing the "finger to nose" task and the "heel to toe" task.

The Defendant testified that [he] had taken his ex-wife to Atlanta on January 17, 2002 and spent the night there. He drove to Columbia the next day, arriving in

Columbia at 3:00 P.M. He went to his mother's house for a while, then went to Jay Jay's Lounge, drank a beer, left there with a friend and went to Sally G's Lounge where he drank a beer, ate a cheeseburger and remained with friends shooting pool for a while, his friend then took him to his car and he drove south on Carmack Blvd. He further stated that when he left Sally G's Lounge, he did not feel the affect of anything he had drunk.

This Court saw nothing on the video tape which would indicate this man was under the influence of any intoxicant.

The jury deliberated from 2:28 P.M. until 3:40 P.M. and returned a verdict of guilty of DUI and guilty of Violation of Implied Consent Law. The jury's verdict was unanimous, accepted by the Court and the jury was discharged. The defense then moved for a Judgment of acquittal notwithstanding the jury's verdict pursuant to Rule 29(c) of the Tennessee Rules of Criminal Procedure.

This motion should be granted.

IT IS THEREFORE, ORDERED, ADJUDGED and DECREED by the Court that the Motion for judgment of acquittal as to Count I and Count 2 of the indictment be granted by the Court.

It is from this order that the State now appeals.

II. Analysis

The State contends that the trial court erred when it granted the Defendant's motion for acquittal notwithstanding the verdict. Specifically, the State asserts that the trial court improperly substituted its own factual findings for those of the jury, failing to review the evidence under the sufficiency of the evidence standard. The Defendant counters that the trial court properly granted the Defendant's motion,¹ and, alternatively, that this Court should remand the case for a new trial in accordance with the "thirteenth juror" rule, Rule 33(f) of the Tennessee Rules of Criminal Procedure, because the trial court disagreed with the jury's decision.

Rule 29(a) of the Tennessee Rules of Criminal Procedure provides that a "court on motion of a defendant or on its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses." Further, Rule 29(c)

¹The Defendant contends that the motion was properly granted because the trial court found, *sua sponte*, that there was not probable cause for the traffic stop that led to the Defendant's arrest. However, we do not address this issue. Because we are remanding the case for a new trial, the parties will have the opportunity to address this issue in pre-trial motions or any other time and manner provided under Tennessee law.

reads as follows:

If the jury returns a verdict of guilty or is discharged without having returned a verdict, a motion for judgment of acquittal may be made or renewed within 30 days of the date the order of sentence is entered or within such further time as the court may fix during the 30-day period. . . . If a verdict of guilty is returned the court may on such motion, set aside the verdict and after disposing of a motion for a new trial enter judgment of acquittal. The [S]tate shall have the right of appeal where the court sets aside a verdict of guilty and enters a judgment of acquittal.

Tenn. R. Crim. P. 29(c) (2003). The standard by which the trial court determines a motion for judgment of acquittal is, essentially, the same standard applied by this Court in “determining the sufficiency of the evidence after a conviction; that is, whether ‘any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.’” State v. Gillon, 15 S.W.3d 492, 496 (Tenn. Crim. App. 1997) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)). Under this standard the trial court must take the strongest legitimate view of the evidence in favor of the State, and allow it all reasonable inferences which might be drawn therefrom. See Id.

A motion for judgment of acquittal presents a question of law. State v. Adams, 916 S.W.2d 471, 473 (Tenn. Crim. App. 1995); State v. Hall, 656 S.W.2d 60, 61 (Tenn. Crim. App. 1983). The trial court must only determine if the evidence is legally sufficient to sustain a conviction. Adams, 916 S.W.2d at 473. “The trial court is not permitted to weigh the evidence in reaching its determination.” Id. “An appellate court must apply the same standard as a trial court when resolving issues predicated upon the grant or denial of a motion for judgment of acquittal.” Id. at 473. As the issue presents a question of law, our review is de novo. Id.

DUI is proscribed by Tennessee Code Annotated section 55-10-401, which provides:

(a) It is unlawful for any person to drive or to be in physical control of any automobile or other motor driven vehicle on any of the public roads and highways of the state, or on any streets or alleys, or while on the premises of any shopping center, trailer park or any apartment house complex, or any other premises which is generally frequented by the public at large, while:

(1) Under the influence of any intoxicant, marijuana, narcotic drug, or drug producing stimulating effects on the central nervous system

Tenn. Code Ann. § 55-10-401(a) (2003). Thus, to sustain a conviction, the State was required to prove that the Defendant was driving or in physical control of an automobile, on a publicly frequented street or other public premises, and under the influence of an intoxicant.

The implied consent law provides:

Any person who drives any motor vehicle in the state is deemed to have given consent to a test for the purpose of determining the alcoholic or drug content of that person's blood; provided, that such test is administered at the direction of a law enforcement officer having reasonable grounds to believe such person was driving while under the influence of an intoxicant or drug

Tenn. Code Ann. § 55-10-406(a)(1) (2003). Further, subsection (a)(3) provides that, "If such person having been placed under arrest and thereafter having been requested by a law enforcement officer to submit to such test and advised of the consequences for refusing to do so, refuses to submit, the test shall not be given, and such person shall be charged with violating this subsection." Tenn. Code Ann. § 55-10-406(a)(3). Thus, to prove that the Defendant violated the implied consent law, the State was required to prove that the officer arrested the Defendant, advised him about the implied consent law, and asked him to submit to a test for determining the alcoholic or drug content of the Defendant's blood, and that the Defendant refused to submit to such a test.

At trial, the State presented evidence that the Defendant was driving his car on a public street. Further, Officer Haywood testified that he has 72 hours of training in the detection of DUI. He said that the Defendant failed several of the field sobriety tests, and he detected the odor of alcohol on the Defendant. The officer said that, based on his experience and training, and based on his observations of the Defendant, the Defendant was too intoxicated to drive. We conclude that this evidence is sufficient to sustain the Defendant's conviction for DUI.

Further, the evidence showed that the officer advised the Defendant on the implied consent law. The officer read the Defendant the standard form explanation on the implied consent law, and the Defendant signed this form acknowledging that he understood the law and the consequences of his failure to submit to the blood test. We conclude that this evidence is sufficient to prove that the Defendant violated the implied consent law.

Having found sufficient evidence to support the jury's verdict, we hold that the trial court erred in granting the Defendant's motion for judgment of acquittal. Our review in this case, however, does not end here. We must now determine the appropriate relief to be granted in this case. The State requests that this Court reinstate the jury's verdict. The Defendant requests that we grant him a new trial, according to the provisions of the "thirteenth juror" rule.

The so called "thirteenth juror" rule, is codified in rule 33 of the Tennessee Rules of Criminal Procedure, which provides, "The court on its own motion, or on motion of a defendant may grant a new trial as required by law." The rules also sets forth, "The trial court may grant a new trial following a verdict of guilty if it disagrees with the jury about the weight of the evidence. If the trial court grants a new trial because the verdict is contrary to the weight of the evidence, upon request of either party the new trial shall be conducted by a different judge." Tenn. R. Crim. P. 33(f) (2003). Intended to "safeguard against juror error" and prevent the "miscarriage of justice by the jury," the

thirteenth juror rule acknowledges that the trial court, like the jury, has the “ability to hear the testimony of witnesses, consider exhibits, reconcile conflicting evidence, and determine credibility.” State v. Dankworth, 919 S.W.2d 52, 55 (Tenn. Crim. App. 1995).

In Dankworth, this Court explained, “There are important distinctions between the setting aside of a verdict under Rule 33(f) and a judgment of acquittal under Rule 29 of the Tennessee Rules of Criminal Procedure.” Id. at 56. This Court said:

To resolve a motion for a judgment of acquittal under Rule 29, the trial court must examine the sufficiency of the evidence. . . . If the trial judge determines that the evidence is insufficient to support a jury’s guilty verdict beyond a reasonable doubt, a judgment of acquittal is granted. The state may not retry the defendant but has the right of appeal.

Rule 33(f) requires the trial judge to independently weigh the evidence and assess the witness’ credibility. The trial judge must be personally satisfied with the verdict. . . .

Id. at 56 (citations omitted).

In State v. Carter, 896 S.W.2d 119 (Tenn.1995), the Tennessee Supreme Court stated:

Just as at common law, Rule 33(f) does not require the trial judge to make an explicit statement on the record. Instead, when the trial judge simply overrules a motion for new trial, an appellate court may presume that the trial judge has served as the thirteenth juror and approved the jury’s verdict. Nonetheless, where the record contains statements by the trial judge expressing dissatisfaction or disagreement with the weight of the evidence or the jury’s verdict, or statements indicating that the trial court absolved itself of its responsibility to act as the thirteenth juror, an appellate court may reverse the trial court’s judgment.

Id. at 122. The Dankworth court explained, however, “A more difficult question arises when the record reflects that the trial court has failed to perform its function or performed it improperly.” Dankworth, 919 S.W.2d at 57. If the trial court’s order demonstrates that it has misunderstood the duty as thirteenth juror, an appellate court must reverse and remand for a new trial. Miller v. Doe, 873 S.W.2d 346, 347 (Tenn. Ct. App. 1993); Hatcher v. Dickman, 700 S.W.2d 898, 900 (Tenn. Ct. App. 1985). “[A]ppellate courts may only affirm the proper exercise of the thirteenth juror function or reverse the improper exercise and remand for a new trial.” Dankworth, 919 S.W.2d at 57.

In the case under submission, the trial court entered its order granting the Defendant’s motion for judgment of acquittal under Rule 29(c). However, in its order, the trial court recited the facts of the case, weighed evidence, and substituted its own findings for those of the jury. The trial court, fulfilling its role as thirteenth juror, conducted an analysis and made findings that were in accordance

with Rule 33, but the court granted the relief available under Rule 29, a judgment of acquittal. We conclude that the trial court's judgment of acquittal must be reversed. However, we also conclude that, because the trial court conducted its thirteenth juror analysis in granting a judgment of acquittal, and the trial court obviously disagreed with the jury's verdict, the appropriate relief in this case is to reverse for a new trial rather than reinstating the jury's verdict. Consequently, we reverse the judgment of the trial court, and we remand the case for a new trial.

III. Conclusion

In accordance with the foregoing reasoning and authorities, the judgment of the trial court is reversed and the case is remanded for a new trial.

ROBERT W. WEDEMEYER, JUDGE